United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

75-7161

(42172)

To be argued by
LEONARD KOERNER

United States Court of Appeals

FOR THE SECOND CIRCUIT

B P/S

BOSTON M. CHANCE, LOUIS C. MERCADO, individually on behalf of all others similarly situated,

against

Plaintiffs-Appellees,

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK; GERTRUDE E. UNGER, individually and in her capacity as Chairman of the Board of Examiners; JAY E. GREENE, MURRAY ROCKAWITZ and PAUL DENN, individually and in their capacities as members of the Board of Examiners; MURRAY BERGTRAUM, individually and in his capacity as President of the Board of Education; ISAIAH E. ROBINSON, Jr., individually and in his capacity as Vice-President of the Board of Education; MARY E. MEADE, SEYMOUR F. LACHMAN and JOSEPH MONSERRAT, individually and in their capacities as members of the Board of Education; HARVEY B. SCRIBNER, individually and in his capacity as Chancellor of the City School District of the City of New York; and THEODORE H. LANG, individually and in his capacity as Deputy Superintendent of Schools of the City of New York,

and

Defendants-Appellants,

COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1, SASCO, AFL-CIO,

Intervenor-Appellant.

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF THE APPELLANTS NEW YORK CITY BOARD OF EDUCATION AND THE CHANCELLOR OF THE BOARD OF EDUCATION

W. BERNARD RICHLAND,
Corporation Counsel of the City of New York,
Attorney for the Appellants New York City Board of Education and the Chancellor of the Board of Education,
Municipal Building,
New York, N. Y. 10007.
566-3322 or 566-4337

L. KEVIN SHERIDAN,
LEONARD KOERNER,
LEONARD BERNIKOW,
of Counsel.

249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited:

United States Court of Appeals

FOR THE SECOND CIRCUIT

BOSTON M. CHANCE, LOUIS C. MERCADO, individually on behalf of all others similarly situated,

Plaintiffs-Appellees,

against

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK: GERTRUDE E. UNSER, individually and in her capacity as Chairman of the Board of Examiners; JAY E. GREENE, MURRAY ROCKAWITZ and PAUL DENN, individually and in their capacities as members of the Board of Examiners; MURRAY BERGTRAUM, individually and in his capacity as President of the Board of Education; ISAIAH E. ROBINSON, JR., individually and in his capacity as Vice-President of the Board of Education; MARY E. MEADE, SEYMOUR P. LACHMAN and JOSEPH MONSERRAT, individually and in their capacities as members of the Board of Education; HARVEY B. SCRIBNER, individually and in his capacity as Chancellor of the City School District of the City of New York; and THEODORE H. LANG, individually and in his capacity as Deputy Superintendent of Schools of the City of New York,

Defendants-Appellants,

and

COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1, SASCO, AFL-CIO,

Intervenor-Appellant.

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF THE APPELLANTS NEW YORK CITY BOARD OF EDUCATION AND THE CHANCELLOR OF THE BOARD OF EDUCATION

---

(1)

Appellees' argument that the appeals by the Board of Education and CSA are untimely is without merit. It is appellees' contention that the order of February 7, 1975, only clarified the order of November 22, 1974 and therefore, the appellants were required to appeal from the order of November 22 (Appellees' Brief pp. 11, 14-16). It is

well settled that, when a party aggrieved by an appealable order requests reconsideration of that order and when the Court responds by reconsidering the order, the underlying adjudication loses finality pending some dispositive action taken by the Court. See *Leishman* v. *Associated Wholesale Electric Co.*, 318 U.S. 203 (1943); *Terrasi* v. *South Atlantic Lines*, 226 F. 2d 823, 824 (2d Cir., 1955), cert. den. 350 U.S. 988 (1955); *Sleek* v. *J. C. Penney, Inc.*, 292 F. 2d 256, 257 (3rd Cir., 1961); *Pacific Maritime Assoc.* v. *Quinn*, 465 F. 2d 108, 109 fn. 1 (9th Cir. 1972); Federal Rules of Appellate Procedure, Rule 4; 9 MOORE'S *Federal Practice* pp. 949-954 (2d Ed.). See also, *In re Casco Fashions Inc.*, 346 F. Supp. 1252 (S.D.N.Y., 1972), affd. 490 F. 2d 1197 (2d Cir., 1973).

In the instant case, on December 17, 1974, Leonard Bernikow, Assistant Corporation Counsel and counsel for the Board of Education and its Chancellor, by letter, requested the District Court to modify its order of November 22, 1974 "concerning excessing" (334). The Court, in response to this request, held a hearing on December 20. At the hearing, Mr. Bernikow informed the Court of the Board of Education's objections to the November 22 order (343). The Court stated that, if Mr. Bernikow was prepared to submit a new order on behalf of his clients, the court "obviously would consider it" (344). On January 17, 1975, the Board of Education submitted a new proposed order (362-368). On February 7, the Court issued a final order on the excessing problem. The final order contained the same racial quota system as the November 22 order but modified the November 22 order with respect to administrative problems in implementing the order (398-403).

In view of the history of these proceedings, it is difficult to understand the appellee's contention that the appellants should have appealed from the November 22 order. The Board of Education had no reason to assume that the District Court would not accept the Board of Education's

proposed order dated January 17, 1975. As we noted in our main brief, the proposed order protects all the plaintiffs who may have been aggrieved by the testing procedures of the Board of Examiners prior to the initial *Chance* decision (App. Br., pp. 35-36). It was only on February 7, the date the Court issued its final order, that the Board became aware that its proposed order had been rejected by the Court. The Board filed a timely appeal from that order.

(2)

Plaintiffs, citing *Johnson* v. *Railway Express*, 43 U.S.L.W. 4623, May 20, 1975, state that the legislative history of Title VII and the Section of Title VII [42 U.SC. 2000e-2(h)] which preserves bona-fide seniority systems are irrelevant in a § 1983 proceeding (Appellees' Brief, p. 22). In *Johnson*, the Supreme Court, reaffirming principles which it had established in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), held that an action brought under §§ 1981, 1983 is independent of an action brought under Title VII. In *Johnson* the Court held that the timely filing of a charge of employment discrimination under Title VII does not toll the running of the statute of limitations applicable to §§ 1981, 1983 actions.

In our main brief, consistent with *Johnson*, we recognized that Title VII actions and actions brought under §§ 1981, 1983 are separate. Similarly, we are not arguing that this Court, in this action brought under § 1983, is restricted to the remedies available under Title VII. It is our position that the legislative history of Title VII, specifically approving bona-fide seniority systems, constitutes a declaration by Congress in favor of employment seniority systems and should be considered by this Court in determining whether the use of a seniority system for excessing purposes violates §§ 1981 and 1983, or is inconsistent with rights guaranteed thereunder.

(3)

In support of their position, the plaintiffs cite *Watkins* v. *United Steel Workers,* 369 F. Supp. 1221 (E.D.La. 1974), app. docketed 5th Cir., No. 74-2604, June 17, 1974, which was followed by three other district courts in *Delay* v. *Carling Brewing Co.,* 9 EPD ¶ 9877 (N.D.Ga., 1974); *Loy* v. *City of Cleveland,* 8 FEP Cases 614 (N.D. Ohio, 1974); *Schaefer* v. *Tannian,* 9 EPD ¶ 10, 142 (E.D. Mich., 1975) (Appellees' Br., p. 21).

In our main brief we showed that *Watkins* is contrary to *Waters* v. *Wisconsin Steel Works of Int. Harvester Co.,* 502 F.2d 1309 (7th Cir., 1974); *Jersey Central Power and Light Co.* v. *Local Unions 327 etc. of I.B.E.W.,* 508 F. 2d 687 (3rd Cir., 1975), and a decision of the Fifth Circuit in *Local 189, United Papermakers & Paperworkers* v. *United States,* 416 F. 2d 980, 994, 995 (1969), cert. den. 397 U.S. 919 (1970).

But, apart from the conflict with decisions of the Court of Appeals, the opinion in *Watkins* distinguishes the facts there from the facts in the instant case. In *Watkins* the Court noted that the beneficiaries of an order establishing a quota system in lieu of a seniority system would be the blacks who were presently working at the plant, but who would have otherwise been excluded because of the company's discriminatory policies. 369 F. Supp. at p. 1231. In *Tannian,* the Court noted that it was "important to point out" that the women protected by the quota system had all applied for employment, but because of discriminatory practices, they had not been hired. 9 EPD ¶ 10, 142 at p. 7649.

As we noted in our main brief, in the instant case, the proposed order of the Board of Education of January 17, 1975, protects all of the plaintiffs who may have been aggrieved by the testing procedures of the Board of Education prior to the *Chance* decision.

It is also interesting to note that in *Watkins* and *Tannian* the courts refused to interpret Title VII and § 1981 to the effect that an employment practice found to be lawful under one statute could be held unlawful under the other. *Watkins*, 369 F. Supp. at p. 1230, *Tannian*, 9 EPD ¶ 10, 142 at p. 7649.

(4)

In their brief the plaintiffs, citing the Amicus Brief on behalf of the New York City School Boards Association, state that the School Boards do not share the appellants' concern with respect to the burden on the Boards resulting from the intra-districting excessing provisions of Judge Tyler's order (Appellees' Brief, p. 31). The School Boards Association does not represent all of the Community School Boards in the City of New York. In any event, appellees do not accurately state the position of the amicus on this appeal. The amicus brief specifically took no position as to the propriety of imposing a quota system on the Community School Boards (Brief, p. 6). The amicus brief was only concerned with preserving the Community School Boards' authority to make their own seniority lists without having the lists reviewed by the Central Board (Brief, pp. 6-7). The scope of the power of the Community School Boards in excessing situations has already been established in *Matter of Supervisors and Administrators* v. *Board of Education*, 73 Misc 2d 783 (Sup. Ct., Kings Co., 1973), affd. 42 AD 2d 930 (2d Dept., 1973), affd. 35 NY 2d 861 (1974).

CONCLUSION

The order appealed from should be reversed and the District Court directed to accept the proposed order of the Board of Education submitted to it on January 17, 1975. Failing this, the Court should modify the order of the District Court so as to require only a racial quota to be maintained in inter-district excessing of supervisors from the entire New York City school system.

June 10, 1975.

Respectfully submitted,

W. Bernard Richland,
Corporation Counsel
of the City of New York,
Attorney for Appellants
New York City Board of
Education and the
Chancellor of the Board
of Education.

L. Kevin Sheridan,
Leonard Koerner,
Leonard Bernikow,
of Counsel.

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

JAMES BURNS being duly sworn, says that on the 9th day of June, 1975, he served the annexed Reply Brief upon Trauble & Greenwald Esq., the attorney for the Union C.S.A. herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 80 - 8th Ave in the Borough of Manh., City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 9 day of June, 1975

John Calia

James Burns

JOHN CALIA
Notary Public, State of New York
No. 41-5573935 Queens County
Certificate Filed in New York County
Commission Expires March 30, 1976

Form 323-50M-721047(72) 346

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

JAMES BURNS being duly sworn, says that on the 9 day of June, 1975, he served the annexed Reply Brief upon Rebell & Krieger Esq., the attorney for the Unions herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 230 - Park Ave in the Borough of Manh., City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 9 day of June, 1975

John Calia

James Burns

JOHN CALIA
Notary Public, State of New York
No. 41-5573935 Queens County
Certificate Filed in New York County
Commission Expires March 30, 1976

Form 323-50M-721047(72) 346

2

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

JAMES BURNS being duly sworn, says that on the 9 day of June, 1975, he served the annexed Reply Brief upon Israel R. Silver Esq., the attorney for the Courtesy copies herein by depositing 3 copies of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 70 West 40th St. in the Borough of Manh., City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 9 day of June, 1975

John Calia

JOHN CALIA
Notary Public, State of New York
No. 41-5573935 Queens County
Certificate Filed in New York County
Commission Expires March 30, 1976

James Burns

3

Form 323-50M-721047(72) 346

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

JAMES BURNS being duly sworn, says that on the 9 day of June, 1975, he served the annexed Reply Brief upon Elizabeth B. Du Bois Esq., the attorney for the Pltff-Applt herein by depositing 3 copies of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 271 Madison Ave in the Borough of Manh., City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 9 day of June, 1975

John Calia

JOHN CALIA
Notary Public, State of New York
No. 41-5573935 Queens County
Certificate Filed in New York County
Commission Expires March 30, 1976

James Burns

4

Form 323-50M-721047(72) 346

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

JAMES BURNS being duly sworn, says that on the 9th day of June 1975, he served the annexed Reply Brief upon Kaye, Scholer, Fierman Esq., the attorney for the Def't Bd. Elec. herein by depositing 3 copies of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 425 Park Ave. in the Borough of Manh., City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this

9 day of June 1975

James Burns

John Calia

JOHN CALIA
Notary Public, State of New York
No. 41-5573935 Queens County
Certificate Filed in New York County
Commission Expires March 30, 1976

5

Form 323-50M-721047(72) 346